No. 04-168

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

JOSEPH LEE GRIMM,

Petitioner,

v.

CHARLES S. SPELL, aka STEVE SPELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES S. SPELL

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QUESTIONS PRESENTED

Is a deputy sheriff sued under 42 U.S.C. § 1983 for violating a plaintiff's Fourth Amendment right to be free from warrantless searches prohibited from raising the defense of qualified immunity merely because the complaint sufficiently alleges a § 1983 claim?

Did the Eleventh Circuit correctly determine that Collier County Sheriff's Deputy Spell is entitled to qualified immunity for participating in a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, when the search was pursuant to a then-valid state statute which authorized the search?

Did the Eleventh Circuit correctly determine that a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, pursuant to a then-valid state statute does not constitute a violation of the takings clause of the Fifth Amendment?

Did the Eleventh Circuit correctly determine that a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, pursuant to a then-valid state statute does not constitute a violation of the equal protection clause of the Fourteenth Amendment?

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REASONS FOR DENYING THE PETITION

The Court should deny Petitioner Joseph Lee Grimm's ("Grimm") petition for writ of certiorari ("Petition"). The decision below of the Eleventh Circuit Court of Appeals does not conflict with any decision of this Court, of another United States Court of Appeals, or of a state court of last resort regarding an important federal question. *See* Supreme Court Rule 10(a). In addition, the decision below does not depart so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. *Id.*

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Supreme Court Rule 15(2) requires a party opposing a petition for writ of certiorari to address all misstatements of fact and law contained within a petition. Pursuant to Rule 15(2), Deputy Spell identifies two misstatements contained within Grimm's Petition.

Grimm's statement of facts is generally accurate. However, it omits one important detail concerning the state statutes Collier County Sheriff's Deputy Charles S. Spell ("Deputy Spell) relied upon in concluding that Respondents Peter Vasquez and Prosscovia Biribawa (the "Department Inspectors") had a right to inspect Grimm's trees without a warrant. In response to Grimm's question as to whether Deputy Spell was in possession of a warrant authorizing the Department Inspectors to examine his trees, the Petition has Deputy Spell telling Grimm, "that he had no warrant and that no warrant is required under Florida law." *See* Petition, pg. ix. While generally accurate, this statement is nonetheless misleading because it omits the fact that Deputy Spell told Grimm that two specific statutes authorized his and the

Department Inspector's actions. According to the Second Amended Complaint, Deputy Spell told Grimm prior to the inspection that he and the Department Inspectors were acting pursuant to Florida Statutes §§ 581.031 and 581.211. *See* Second Amended Complaint, ¶¶ 22 & 26. This distinction is critical to Deputy Spell's defense. As demonstrated below, Fla. Stat. § 581.031 (2000), on its face, plainly authorized the Department Inspectors to inspect Grimm's trees without a warrant. Moreover, Fla. Stat. § 581.211 plainly authorized Deputy Spell to arrest Grimm if he interfered with the inspection.

The second misstatement in the Petition is a misstatement of law. Grimm erroneously asserts that Florida law prohibited Department Inspectors from inspecting citrus trees for citrus canker unless the area being inspected had first been quarantined by the Florida Department of Agriculture and Consumer Services (the "Department"). This is not the case. Florida Statute § 581.031(15)(a) (2000) permits Department Inspectors to inspect plants for plant pests, including citrus canker, anywhere within the State of Florida, regardless of whether the area in question is under quarantine.[1] *See also* Fla. Stat. § 581.031(7).

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1. Grimm's claim that Department Inspectors cannot inspect trees not within a quarantined area also defies common sense. The Department cannot quarantine an area unless it first has reason to believe it is infested with citrus canker. Before it can quarantine an area, the Department must first inspect trees within an area to determine whether an infestation exists. Without the power to inspect trees in areas not already under quarantine, it would be difficult for the Department to impose a quarantine in the first place.

ARGUMENT

I. The Eleventh Circuit Correctly Held That Deputy Spell Is Entitled To Assert The Defense Of Qualified Immunity

The Eleventh Circuit held that, "it is clear that the defendants were acting within the scope of their discretionary authority when they inspected Grimm's property." *See* Appendix A-I-7. Based upon this finding, the Eleventh Circuit determined that Deputy Spell is entitled to assert the defense of qualified immunity. *Id.* In the Petition, Grimm asserts that the Eleventh Circuit erred in concluding that Deputy Spell is entitled to assert the defense of qualified immunity because, according to Grimm, Deputy Spell was not acting within the scope of his discretionary authority. Grimm reaches this conclusion by advancing the following flawed syllogistic reasoning. The defense of qualified immunity may only be asserted by police officers who are acting within their discretionary authority. Police officers do not have discretionary authority to violate the Constitution. The allegations in the complaint, which must be accepted as true, establish that Deputy Spell violated Grimm's Fourth Amendment rights. Because Deputy Spell does not have discretionary authority to violate Grimm's Fourth Amendment rights, Deputy Spell was not acting within the scope of his discretionary authority when he violated Grimm's Fourth Amendment Rights. Because Deputy Spell was not acting within the scope of his discretionary authority, he is precluded from asserting the defense of qualified immunity.

Grimm's argument is both flawed and contrary to the decisions of this Court. In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), this Court held that courts may not even address the issue of qualified immunity unless there is a prior finding that the allegations in the complaint establish that the defendant asserting the defense of qualified

immunity has violated the plaintiff's constitutional rights. Grimm's argument is directly contrary to *Saucier* and completely misunderstands the defense of qualified immunity — that it is a defense applicable when a government official has actually infringed (or alleged to have infringed) upon a constitutional right. If Grimm's logic were to prevail, the defense of qualified immunity would be completely lost. The Eleventh Circuit's finding that Deputy Spell's actions violated Grimm's Fourth Amendment rights does not preclude Grimm from asserting the defense of qualified immunity. Instead, it gives rise to the occasion to assert the defense. Thus, the Eleventh Circuit correctly held that Deputy Spell was entitled to assert the defense of qualified immunity.

II. The Eleventh Circuit Correctly Held That Deputy Spell Is Entitled To Qualified Immunity As To Grimm's Fourth Amendment Claim

Grimm petitions this Court to exercise its discretionary jurisdiction to resolve what he characterizes as a conflict between the Eleventh Circuit's determination that Deputy Spell is entitled to qualified immunity and this Court's decision in *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Grimm argues Deputy Spell is not entitled to qualified immunity because, on the date in question, the *Camara* case clearly established that Deputy Spell's conduct was unconstitutional. Grimm also argues that a 1984 Florida Attorney General Opinion clearly established that Deputy Spell's conduct was unconstitutional. However, contrary to Grimm's assertions, the Eleventh Circuit's determination that Deputy Spell is entitled to qualified immunity does not conflict with any decision of this Court.

The Eleventh Circuit's finding that Deputy Spell is entitled to qualified immunity is correct for two reasons. First and foremost, the Eleventh Circuit found that Deputy Spell's actions were pursuant to two apparently valid Florida Statutes. Second, neither the *Camara* case nor the Florida Attorney General Opinion provided Deputy Spell fair warning that a warrantless search of Grimm's trees was unconstitutional.

The essence of qualified immunity analysis is reasonableness — whether or not, given the then-current state of the law, it was reasonable under the circumstances for a government official to violate a plaintiff's constitutional right.[2] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, 106 S. Ct. 1092, 1095, 89 L. Ed. 2d 271 (1986). If the official's mistake was reasonable, then the official is entitled to qualified immunity. *Id.* The Eleventh Circuit concluded that Deputy Spell's actions violated Grimm's Fourth Amendment rights. *See* Appendix A-I-7. Thus, the resolution of Deputy Spell's qualified immunity claim boils down to whether he made a reasonable mistake: Was it reasonable for Deputy Spell to conclude that Fla. Stat. § 581.031 authorized the Department Inspectors to enter Plaintiff's property without a warrant and inspect Plaintiff's trees? Was it reasonable for Deputy Spell to conclude that F.S. § 581.211 authorized him to arrest the Plaintiff if the Plaintiff interfered with the Department Inspectors' inspection? The Eleventh Circuit correctly concluded that Deputy Spell's conclusions were reasonable and, therefore, he is entitled to qualified immunity.

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2. Qualified immunity analysis presupposes the existence of a constitutional violation. *See Saucier v. Katz*, *supra*.

a. Law Enforcement Officers Are Entitled To Presume That State Statutes Are Constitutional

The Second Amended Complaint specifically alleges that Deputy Spell relied on Florida Statutes §§ 581.031 and 581.211 as authority to inform Grimm that: (1) the Department Inspectors were authorized to enter his yard to inspect his citrus trees; and (2) that Grimm could be subject to arrest if he interfered with the inspection. *See* Second Amended Complaint, ¶¶ 22 & 26. Deputy Spell contends that the Eleventh Circuit correctly determined that he is entitled to qualified immunity for violating Grimm's Fourth Amendment rights because his actions were in good faith and based upon a reasonable reading of Florida Statutes §§ 581.031 and 581.211.

Florida Statute § 581.031 (2000) grants the Department extensive authority to regulate plants located within the State of Florida. For instance, F.S. § 581.031(4) authorizes the Department to regulate the bringing in of all plants into the State of Florida. Florida Statute § 581.031(6) allows the Department to declare as a nuisance any plant pest and anything infected by or exposed to a plant pest. Florida Statute § 581.031(7) authorizes the Department to declare a quarantine over all or part of any area or county within the State of Florida if the Department determines that the quarantined area sustains a plant pest which threatens the agricultural, horticultural, or public interest of the State. Florida Statute § 581.031(14)(a) allows the Department to test nursery stock or any other article to determine whether it harbors plant pests. Florida Statute § 581.031(17) authorizes the Department to cause the destruction of plants capable of harboring plant pests if they are infected or located in an area which may be suspected of being infected by plant pests.

As part of this statutory scheme to control plant pests, the Florida legislature grants the Department broad authority to inspect plants for the presence of pests. Florida Statute § 581.031(15)(a) authorizes the Department to inspect any plant that may be capable of disseminating or carrying plant pests. Furthermore, § 581.031(15)(a) specifically authorizes the Department to enter upon any place thought to contain a plant pest which poses a threat to the interests of the State. As noted by the Eleventh Circuit, § 581.031 does not require a warrant before such inspections may be conducted. *See* Appendix A-I-4. Clearly, Fla. Stat. § 581.031, on its face, authorizes Department Inspectors to enter a person's yard without a warrant and inspect any plant located within the yard for plant pests. Deputy Spell's statement to Grimm that Fla. Stat. § 581.031 authorized the Department Inspectors to enter onto Grimm's yard without a warrant was entirely reasonable and based upon the plain wording of § 581.031.

Similarly, Deputy Spell's statement to the Plaintiff that interference with the Department Inspectors' inspection could result in Plaintiff's arrest was also reasonable in light of Fla. Stat. § 581.211 (2000). Florida Statute § 581.211(1)(c) states, "Any person who . . . interferes with or obstructs any director or authorized representative of the [D]epartment in the performance of his or her duties . . . commits a misdemeanor in the first degree . . ." *See* Fla. Stat. § 581.211(1)(c) (2000). Given that Fla. Stat. § 581.031 authorized the Department Inspectors to conduct an inspection on Grimm's property, Deputy Spell acted reasonably in informing Grimm that Fla. Stat. § 581.211 authorized him to arrest Grimm if he continued to refuse to allow the Inspectors to conduct their inspection.

The Eleventh Circuit properly noted that "the face of Florida Statute § 581.031 allows inspections and does not mention a warrant, stating that [the Department] has the

power and duty 'to inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place." *See* Appendix A-I- 4. The Eleventh Circuit also noted that Fla. Stat. § 581.184(9) directs that, "upon request of [the Department], the sheriff . . . shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section." *See* Appendix A-I-4.[3]

Based upon the foregoing, it is imminently clear that Deputy Spell reasonably interpreted Fla. Stat. § 581.031 as authorizing the Department Inspectors to enter onto Plaintiff's property without a warrant to inspect citrus trees in the yard. Deputy Spell also reasonably interpreted Fla.Stat. § 581.211(1) to authorize him to arrest the Plaintiff if the Plaintiff interfered or obstructed with the inspection.

It is a well-established principle in the State of Florida that laws are presumed constitutional until they are declared unconstitutional. *See Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002). If any doubt exists as to the validity of a law, it must be resolved in favor of constitutionality where reasonably possible. *Id.*

> When construing statutes, the courts must assume that the Legislature intended to enact an effective law. Statutes are presumptively valid and constitutional, and will be given effect if possible. All doubts will be resolved in favor of constitutionality . . . Acts of the Legislature are

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3. Curiously, the Eleventh Circuit relied solely on § 581.184(9) as providing Deputy Spell with apparent authority to arrest Grimm if he obstructed the inspection. Respondent contends the Eleventh Circuit should also have found that Fla. Stat. § 581.211(1) provided Deputy Spell with this authority.

> presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.

See Department of Business Regulation v. Smith, 471 So. 2d 138, 142-43 (Fla. 1st DCA 1985) (internal citations omitted).

This principle of law is not unique to Florida jurisprudence. In *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153, 64 S. Ct. 474, 479, 88 L. Ed. 2d 425 (1944), this Court stated, "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." As noted by the Eleventh Circuit, as of June 20, 2000, no court had declared § 581.031 or § 581.184(9) unconstitutional and no court had held that a search warrant was needed under the circumstances at issue in this case. *See* Appendix A-I-8-9. Similarly, as of June 20, 2000, no court had declared § 581.211 unconstitutional. Therefore, under the foregoing case law, Deputy Spell was entitled to presume that §§ 581.031, 581.211, and 581.184(9) were constitutional and valid.

In *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), this Court held that an officer who makes an arrest based upon probable cause that an arrestee has violated a statute is entitled to qualified immunity in a § 1983 action for false arrest even though the statute was later declared unconstitutional. This Court in *Pierson* stated, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555, 87 S. Ct. at 1218. This Court held that qualified immunity was appropriate because the officer should be excused from liability "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." *Id.*

In *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 323 (1979), this Court addressed, in the context of the applicability of the exclusionary rule, "whether an arrest made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality." *Id.* at 33, 99 S. Ct. at 2629. In answering this question in the affirmative, the Court rejected the notion that the officer "should have known the ordinance was invalid and would be judicially declared unconstitutional." *Id.* at 37, 99 S. Ct. at 2632. This Court stated:

> At [the time of arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional.
>
> Police are charged to enforce laws until and unless they are declared unconstitutional. *The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality* — with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38-39, 99 S. Ct. at 2632. (emphasis added)

This Court's reasoning in *DeFillippo* applies to this case. At the time of the inspection of Grimm's citrus trees, no court or other authority had ever held that Fla. Stat. § 581.031 was unconstitutional. It is not the function of patrol officers to speculate as to the constitutionality of valid Florida statutes. Deputy Spell, as a law enforcement officer, has a duty to follow the laws of the State of Florida until they are declared invalid. Deputy Spell was therefore entitled to assume that Fla. Stat. § 581.031 was valid and that the Department Inspectors were authorized to inspect Grimm's citrus trees.[4]

While *Pierson* and *DeFillippo* involve the validity of an arrest made pursuant to a statute subsequently declared unconstitutional, *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), involves the legality of a warrantless administrative search conducted pursuant to a statute that is subsequently declared unconstitutional. In *Krull*, this Court held that the exclusionary rule does not apply to evidence seized pursuant to a warrantless search authorized by a statute subsequently declared unconstitutional if the officers reasonably relied upon the statute being constitutional. Referring to the concept of qualified immunity and *Harlow v. Fitzgerald*, *supra*, this Court stated:

> A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature

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4. Both *Pierson* and *DeFillippo* concern the validity of an *arrest* made pursuant to a statute subsequently declared unconstitutional. No arrest was made in this case because Grimm ultimately allowed the Department Inspectors to conduct an inspection. As a result, Deputy Spell had no occasion to arrest Grimm for obstruction under Fla. Stat. § 581.211. However, had Grimm obstructed the inspection and had Deputy Spell arrested him under F.S. § 581.211, it is clear that under *Pierson* and *DeFillipo* Deputy Spell would be entitled to qualified immunity from a § 1983 claim for false arrest.

> wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. . . . As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers.

Krull, 480 U.S. at 355, 107 S. Ct. at 1170. But absent a situation where the legislature wholly abandoned its responsibility to enact constitutional laws, this Court in *Krull* stated:

> Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. . . 'Penalizing the officer for the legislature's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.'

Id. at 349-350, 107 S. Ct. at 1167.

Both the Eleventh Circuit and the district court correctly determined that it was not clearly established as of June 20, 2000 that Fla. Stat. § 581.031 was unconstitutional or that a search warrant was required where a landowner objected to a warrantless inspection of his trees pursuant to this section. *See* Appendix A-I-7-9; Appendix A-II-13 The lower courts correctly noted that at the time of the inspection, no Florida

or Federal court had ruled that a search warrant was required before Department employees could enter a homeowner's property to inspect trees for citrus canker. *Id.* Based upon the foregoing Deputy Spell was reasonably entitled to presume that § 581.031 was valid law and permitted the Department Inspectors to conduct a warrantless inspection of Grimm's trees over Grimm's objections.

b. The Eleventh Circuit Correctly Affirmed The District Court's Finding That *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), Did Not Clearly Establish That The Department Inspectors' Warrantless Inspection Of Grimm's Trees Was Unconstitutional

The Eleventh Circuit correctly affirmed the district court's finding that *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), did not clearly establish that the Department Inspectors' warrantless inspection of Grimm's trees was unconstitutional. *See* Appendix A-I-9-10; Appendix A-II-13-14. *Camara* is distinguishable in several significant respects. The relief sought in *Camara* was a writ of prohibition to a criminal court where the plaintiff was being prosecuted for refusing to permit a warrantless inspection of the interior of his residence. *Camara*, unlike this case, did not involve a § 1983 action for damages.[5] A second distinction is that *Camara* concerned a warrantless inspection of the interior of a residence. This case, unlike *Camara*, does not involve an inspection of the interior of Grimm's residence.

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5. In fact, if *Camara* had involved a § 1983 false arrest claim against the arresting officer, applying the reasoning of *Pierson*, *supra*, and *DeFillippo*, *supra*, it is clear that the arresting officer would have been qualifiedly immune from suit because he arrested the plaintiff in reliance upon a then-valid state statute.

The inspection at issue here is of citrus trees located in Grimm's yard. The privacy concerns here are much lower that those involved in *Camara*. A third distinction is that the purpose of the inspection in *Camara* was to determine if the plaintiff was illegally using his leasehold as a personal residence. *See Camara*, 387 U.S. at 526, 87 S. Ct. at 1729. Conversely, the purpose of the inspection in this case was to determine if Plaintiff's trees were infected with citrus canker — a condition which is entirely due to natural causes and would not reflect any illegal activity on the Plaintiff's part. *See generally Florida Dept. of Agriculture & Consumer Services v. City of Pompano Beach*, 792 So.2d 539 (Fla. 4th DCA 2001) and *State v. Sun Gardens Citrus, LLP*, 780 So. 2d 922 (Fla. 2d DCA 2001). Another distinction is that the objects of the inspection, citrus trees, are traditionally regulated within the State of Florida. *Id.*; *see also* Chapter 581, Florida Statutes (2000).

Plaintiff's reliance on a 1984 Florida Attorney General opinion, AGO 84-32, as clearly establishing that Deputy Spell's actions were unconstitutional is misplaced for several reasons. First, Attorney General opinions do not create clearly established law. *See Jenkins v. Talladega City Bd. of Education*, 115 F.3d 821, 827 n.4 (11th Cir. 1997) (holding that only opinions from this Court, the Eleventh Circuit, and the Supreme Court of Florida clearly establish law for qualified immunity purposes). Second, the opinion cited by Plaintiff refers to municipal code inspectors, not to citrus canker inspectors. Lastly, the opinion cited does not express any opinion on the constitutionality of Fla. Stat. § 581.031, a presumptively valid state statute.

Given the fact that Fla. Stat. § 581.031, a presumptively valid and constitutional statute, authorized the warrantless inspection of Grimm's trees and the significant differences between the facts in *Camara* and the circumstance involved

in the present case, it cannot be said that *Camara* clearly established that the inspection of Plaintiff's trees was unconstitutional. With respect to whether Deputy Spell reasonably should have known that § 581.031 was unconstitutional, "it must also be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers." *See United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985). It also must be remembered that:

> Such officials as police officers . . . who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to the plethora of rules 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively' . . . In these circumstances, officials should not err always on the side of caution.

See Davis v. Scherer, 468 U.S. 183, 196, 104 S. Ct. 3012, 3020, 82 L. Ed. 2d 139 (1984), *quoting* P. Schuck, Suing Government 66 (1983).

The determination of whether Deputy Spell is entitled to qualified immunity turns on whether his actions were reasonable under the circumstances. Because officers of reasonable competence could disagree on whether, in light of Fla. Stat. § 581.031, Deputy Spell violated Grimm's constitutional rights, Deputy Spell is entitled to qualified immunity. *See Malley*, 475 U.S. at 341, 106 S. Ct. at 1096. In this case Deputy Spell informed Grimm that the agricultural inspectors had a right under Fla. Stat. § 581.031 to conduct a warrantless inspection of his citrus trees to

check for the presence of citrus canker. The inspection at issue concerned an inspection of trees in Grimm's yard. The inspection did not involve entry into his home or automobile or an inspection of any of his papers.

In *Garner v. Memphis Police Dept.*, 600 F.2d 52 (6th Cir. 1979), *aff'd Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), a police officer shot in the back an unarmed 15 year old boy who was fleeing the scene of a burglary. The officer shot the boy not because of any imminent danger but because he feared the boy would escape capture. The shooting was pursuant to a state statute which authorized the use of all necessary force to stop a fleeing felon. Subsequently, the officer was sued under § 1983 for violating the boy's Fourth Amendment constitutional rights. The Sixth Circuit affirmed the trial court's finding that the officer was entitled to qualified immunity because he acted pursuant to a valid state statute. On appeal in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), this Court did not disturb the Sixth Circuit's ruling on the officer's entitlement to qualified immunity but found both the shooting and the statute authorizing the shooting were unconstitutional. If the police officer in *Garner* was entitled to qualified immunity for shooting a boy in the back because the officer acted pursuant to a valid state statute which was subsequently declared unconstitutional, then Deputy Spell certainly is entitled to qualified immunity here. The Fourth Amendment intrusion of inspecting door-yard trees for citrus canker is minuscule in comparison to the intrusion in *Garner*.

III. The Eleventh Circuit's Ruling That The Second Amended Complaint Does Not State A Fifth Amendment Claim Does Not Conflict With Any Decision of This Court or Of Any Other Court of Appeals

The Eleventh Circuit adopted the district court's finding that the Second Amended Complaint failed to state a claim for taking without just compensation under the Fifth Amendment. *See* Appendix A-I-7. The district court and, through adoption, the Eleventh Circuit correctly held that the Department Inspectors' entry onto Grimm's property to inspect his citrus trees for the presence of citrus canker neither effected a physical taking nor a regulatory taking of his property under the Fifth Amendment. *See* Appendix A-II-8-9, *citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). In his Petition, Grimm admits his Fifth Amendment claim is novel. *See* Petition, pgs. 8-11. Because the Fourth Amendment "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct" (warantless searches of private property), the Fourth Amendment governs this case, and not the more attenuated (under the circumstances in this case) Fifth Amendment protection from taking of private property for public use without compensation. *See generally Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 1870-71, 104 L. Ed. 2d 443 (1989) (holding that the substantive due process clause of the Fourteenth Amendment cannot supply the basis for a civil rights claim if the challenged governmental conduct is prohibited by another, more specific, constitutional right). Accordingly, the Eleventh Circuit correctly affirmed the dismissal of Grimm's Fifth Amendment claim for failure to state a claim.

IV. The Eleventh Circuit's Ruling That The Second Amended Complaint Does Not State An Equal Protection Claim Does Not Conflict With Any Decision of This Court or Of Any Other Court of Appeals

The Eleventh Circuit adopted the district court's finding that the Second Amended Complaint failed to state an equal protection claim. *See* Appendix A-I-7. The district court and, through adoption, the Eleventh Circuit correctly held that the Department Inspectors entry on to Grimm's property to inspect his citrus trees for the presence of citrus canker did not violate the equal protection clause of the Fourteenth Amendment. *See* Appendix A-II-9-10.

Grimm's convoluted equal protection claim is premised upon his mistaken belief that Florida law only permitted the Department to inspect trees on lands that have previously been quarantined. *See* Petition, pgs. 11-12. As shown earlier, Fla. Stat. § 581.031(15)(a) contains no such limitation. Therefore, Grimm's claim that the Respondents may be presumed to have improperly constructively classified his property as quarantined by entering upon his property falls under its own weight.

Additionally, the district court properly dismissed Grimm's equal protection claim because the Second Amended Complaint failed to allege that Respondents treated him differently from others similarly situated and that the disparate treatment arose out of a discriminatory motive or purpose. *See* Appendix A-II-9-10, *citing Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1545 (11th Cir. 1994) and *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507 (11th Cir. 1995).

CONCLUSION

For the foregoing reasons, Respondent, Deputy Charles Spell, asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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